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August 7, 2008

VIA HAND DELIVERY

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Room TW-A325
Washington, DC 20554

FILED/ACCEPTED
AUG - 7 2008
Federal Communications Commission
Office of the Secretary

Re: Response to Comcast's Challenge to Request For Confidential Treatment, *In the Matter of TCR Sports Broadcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Comcast Corporation*, File No. CSR-8001-P.

Dear Ms. Dortch:

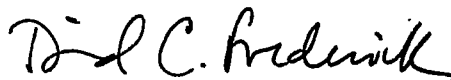
On July 1, 2008, TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network, Inc. ("MASN"), filed a Carriage Agreement Complaint against Comcast Corporation ("Comcast"). Because that Complaint contained what MASN believed to be confidential, non-public information about MASN, about Comcast, and about the parties' private negotiations and dispute, that Complaint was designated as "Confidential - Not for Public Inspection." On July 9, 2008, in accord with the Commission's rules, MASN filed a redacted version of the Complaint. In supplying the redacted Complaint, MASN explained that the redacted portions of the Complaint contained what MASN understood to be confidential information about MASN, about Comcast, and about the parties' private negotiations and dispute, including non-public details regarding the sensitive "negotiations leading to a carriage agreement." MASN believes that much of that information is not available for public inspection as a *per se* matter under 47 C.F.R. § 0.457(d), and that other information is otherwise protected from disclosure.

On the same day that Comcast filed its Answer to MASN's Complaint — and without having attempted to discuss these matters with MASN — Comcast sent a letter to the Commission "challeng[ing] as overbroad and unjustified the confidentiality designations made by" MASN. Comcast asked that the Commission order MASN to provide a re-redacted Complaint no later than August 7, 2008, with a justification for any redactions. Although MASN

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believes that Comcast's challenge is procedurally improper¹ and substantively wide of the mark (especially because many of the redactions were aimed at protecting Comcast's interests),² in order to free the Commission from the burden of deciding these issues, MASN has submitted a further redacted version of the complaint. The only information redacted in this version of the Complaint is information about Comcast's subscriber numbers, which MASN understands to be confidential and competitively sensitive information.³

Respectfully,



David C. Frederick

¹ There are specific procedures to seek access to information that has been designated as not for public inspection, and Comcast does not invoke those rules here. See 47 C.F.R. § 0.461. Until a proper request for public inspection is made, moreover, the Commission need not even act on the proposed redactions. See *id.* § 0.459(d)(1).

² Comcast is wrong (at 2 n.8), for example, in believing that an ability to access certain of the relevant documents via state-court Pacer — which requires specialized knowledge, a password, and is typically a fee service — counts as the public domain sufficient to defeat a claim of confidentiality. See *Jarvis v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, No. 4:07-cv-00111, 2008 WL 2620741, at *12 (N.D. Fla. June 30, 2008) (“A document previously disclosed may have ‘practical obscurity’ and might not again become public without a diligent search. As a consequence, the individual privacy exemption in the FOIA is not necessarily vitiated by prior disclosures.”). Comcast is also wrong in believing that the protections of 47 C.F.R. § 0.457(d) are disavowed simply because of past partial disclosure of some information relating to a carriage contract. Information that has had limited disclosure can nonetheless be confidential when it is disclosed in the full context of other non-public information, such as details of the parties’ private negotiations. See *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 764 (1989) (recognizing the difference between “scattered” public “disclosure” of “bits of information” and revelation “of the rap sheet as a whole”; holding that there is “[p]lainly” a “vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information”); *Martin Marietta Corp. v. Dalton*, 974 F. Supp. 37, 40 (D.D.C. 1997) (“The prior release of information to a limited number of requesters does not necessarily make the information a matter of common public knowledge, nor does it lessen the likelihood” of “competitive harm”); *Washington Post v. U.S. Dep’t of Defense*, 766 F. Supp. 1, 10 (D.D.C. 1991) (“[c]lassification and withholding of information already in the public domain may also be justified on the ground that . . . , revealing the context in which the information is discussed would itself reveal additional information”). For those reasons, any suggestion by Comcast that MASN acted improperly in providing a redacted Complaint are unfounded, especially when many of the redactions were made to protect Comcast.

³ It is not clear from its letter whether Comcast is requesting redacted versions of MASN’s exhibits. MASN stands ready to provide those materials, if the Commission requires them. Alternatively, MASN stands ready to meet and confer with Comcast regarding these issues.

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REDACTED

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

FILED/ACCEPTED
AUG - 7 2008
Federal Communications Commission
Office of the Secretary

In the Matter of)
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TCR Sports Broadcasting Holding, L.L.P.,)
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Complainant,)
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v.)
)
Comcast Corporation,)
)
Defendant.)

File No. 8001-P

TO: The Commission

CARRIAGE AGREEMENT COMPLAINT

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INTRODUCTION AND SUMMARY

This complaint arises out of continuing efforts by Comcast Corporation ("Comcast") to cause competitive harm to TCR Sports Broadcasting Holding, L.L.P. ("TCR"), d/b/a Mid-Atlantic Sports Network, Inc. ("MASN"). MASN is an independent regional sports network ("RSN") that owns the rights to televise the Major League Baseball ("MLB") games of the Washington Nationals and Baltimore Orioles. After a sixteen-month effort by MASN that culminated in two landmark orders of this Commission, Comcast finally ended its complete foreclosure of MASN from its systems within MASN's television territory, which encompasses all or part of six states and the District of Columbia ("MASN's Territory"). But in entering into a carriage contract with MASN, Comcast omitted material information that resulted in its failing to launch a substantial number of subscribers in markets that historically carried the Orioles MLB games on Comcast's affiliated networks. When MASN objected to that continuing partial foreclosure, Comcast refused to carry MASN, even though in nearly all of those markets where it now excludes MASN Comcast itself has a competing RSN vying with MASN to provide "must-have" sports programming. Comcast's material omissions in contracting with MASN in August 2006 thus became the means for Comcast to continue discriminatory treatment of MASN, with the aim of impeding competition from an unaffiliated RSN.

The circumstances surrounding Comcast's refusal to launch MASN in the remaining markets in MASN's Territory raise significant and troubling questions about Comcast's actions and representations, including material information regarding Comcast's systems and subscribers intentionally withheld from MASN. In August 2006, this Commission issued both its *Adelphia*

*Order*¹ and its order² finding that MASN had made out a *prima facie* showing that Comcast was illegally refusing carriage to protect Comcast's affiliated RSN serving the Mid-Atlantic region, Comcast SportsNet Mid-Atlantic ("CSN-MA"). Under this Commission's orders, MASN had ten days from release of the *Adelphia Order* to decide whether to proceed with an arbitration or a Commission administrative law judge ("ALJ") to resolve its carriage dispute. But seeking to resolve the dispute with Comcast amicably, if possible, MASN immediately sent Comcast another copy of its draft offer of carriage or "Term Sheet," which provided that Comcast would launch "all Comcast systems" under terms and conditions accepted by numerous other multichannel video programming distributors ("MVPDs") in MASN's Territory.³

Comcast waited until the eighth day of the ten-day window to respond with a signal that it intended to "get the deal done." In hurried discussions that occurred on the ninth and tenth days of MASN's window, the parties focused on the launch dates for Comcast's systems within MASN's Territory. Very late in that process, Comcast raised what it described as difficulties with launching former Adelphia systems that it was acquiring under the *Adelphia Order*.

Comcast represented that those systems served approximately [REDACTED] subscribers in Roanoke/Lynchburg and other Virginia areas and that it was uncertain when they would be

¹ Memorandum Opinion and Order, *Applications for Consent to the Assignment and/or Transfer of Control of Licenses; Adelphia Communications Corp. to Time Warner Cable Inc.; Adelphia Communications Corp. to Comcast Corp.; Comcast Corp. to Time Warner Inc.; Time Warner Inc. to Comcast Corp.*, 21 FCC Rcd 8203 (2006) ("*Adelphia Order*") (attached as Exh. 1).

² Memorandum Opinion and Hearing Designation Order, *TCR Sports Broadcasting Holding, L.L.P., v. Comcast Corp.*, 21 FCC Rcd 8989 (2006) ("*MASN Order*") (attached as Exh. 2).

³ See Draft Affiliate Term Sheets dated April 13, 2005, October 6, 2005, August 2, 2006 and August 4, 2006 (attached as Exh. 3).

upgraded. Based on those representations, MASN agreed not to press for a specific launch date of those former Adelphia systems.

Three hours before MASN had to decide whether to launch an arbitration or proceed with an ALJ, Comcast introduced for the first time a critical change in the contract language of the carriage agreement. In an email sent at approximately 1:30pm on the tenth day (Friday, August 4, 2006), Comcast represented that its proposed changes to the contract reflected the “deal we’ve been discussing.” Exh. 3, at 30. Its proposal struck the words that “all Comcast systems” would be launched, and inserted that Comcast would launch systems denominated on Schedule A on specific launch dates and any other systems at its “discretion.”⁴ Schedule A then listed systems serving approximately [REDACTED] subscribers with launch dates of September 1, 2006 (approximately [REDACTED] subscribers), and April 1, 2007 [REDACTED] of the remaining Comcast’s [REDACTED] subscribers), with [REDACTED] subscribers of the [REDACTED] to be launched by April 1, 2008.

Comcast explained its request for that language change on the ground of its uncertainty over when those former Adelphia systems would be upgraded. The “discretion,” in other words, was to give Comcast flexibility on the precise dates when those systems serving [REDACTED] Adelphia subscribers would be launched when upgraded. It was also intended to give Comcast flexibility in the event it acquired cable systems from other MVPDs in MASN’s Territory during the contract’s term.

Notwithstanding those representations – and MASN’s reasonable reliance on them – Comcast did not launch MASN for an additional [REDACTED] subscribers on systems that were never former Adelphia systems. As to those Comcast systems, Comcast never represented to MASN that it could not or would not launch them, and on most of those systems Comcast has

⁴ Draft Affiliate Term Sheet dated August 4, 2006 (Exh. 3, at 31, 41); see Final Affiliate Term Sheet dated August 4, 2006 (“Term Sheet”) (attached as Exh. 4).

a competing RSN that shows MLB games of the Philadelphia Phillies. Instead, in its eleventh-hour List of Systems on Schedule A specifying launch dates, it simply omitted them. Because Comcast's systems names and number of subscribers is highly proprietary information, MASN had no way of verifying that Comcast's Schedule A left out any systems other than the former Adelphia systems that Comcast had specifically discussed. Nor did MASN have any reason not to trust or rely on Comcast given Comcast's express representation that the Schedule A list represented the "deal we've been discussing" (Exh. 3, at 30) – a deal that from its inception contemplated the launch of "all Comcast systems."

Months later MASN learned the truth. Instead of launching "all Comcast systems" other than those former Adelphia systems that had been specifically discussed, Comcast has failed to launch approximately [REDACTED] of its entire subscriber base in MASN's Territory, approximately [REDACTED] subscribers. One of the markets not launched – Harrisburg, Pennsylvania – historically had carried Orioles games and presently hosted a Nationals minor league franchise. And in the bulk of the markets where Comcast has not launched MASN, it continued to carry an affiliated RSN that competes with MASN for "must-have" regional sports programming, advertising dollars, and fan loyalties.

When MASN complained to Comcast and demanded carriage on the unlaunched systems, Comcast refused. Comcast has taken the position that the contract MASN entered into forecloses MASN from demanding carriage in those non-launched markets. That position is untenable. First, the contract nowhere says that MASN can *not* be launched by Comcast in those markets. Second, the deal all along called for MASN to be launched on "all Comcast systems" and was amended only at the last minute to accommodate Comcast's represented need for additional time to upgrade former Adelphia systems. Neither the contract by its plain terms nor

the discussions leading up to it support Comcast's position. Third, Comcast cannot rest on its last-minute amended language to give it "discretion" to launch other systems, because Comcast is exercising that "discretion" for an unlawful purpose and effect – to discriminate against an unaffiliated RSN by treating it substantially worse than it treats its own affiliated RSNs. Finally, Comcast asserts that MASN agreed not to launch all of those systems, even though none of the experienced negotiators for either side ever mentioned excluding *any* non-Adelphia cable systems located anywhere, much less Harrisburg or the Tri-Cities DMA in Virginia specifically. (Indeed, even with respect to the former Adelphia systems, MASN never agreed to exclude those systems for all time; rather, the pre-agreement discussions led MASN to believe that after Comcast upgraded those systems MASN would be launched on them. *See* Declaration of David Gluck ¶¶ 17-18 ("Gluck Decl.") (attached as Exh. 5); Declaration of Mark C. Wyche ¶ 13 ("Wyche Decl.") (attached as Exh. 6.)) Notwithstanding a year-long effort by MASN to resolve this dispute without bringing this action, Comcast has refused to provide carriage for any of the approximately [REDACTED] subscribers on still unlaunched systems.

Comcast's "discriminat[ory]" conduct with respect to MASN's unlaunched systems has the purpose and effect of "restrain[ing]" MASN's "ability . . . to compete fairly" with Comcast's affiliated RSNs. 47 C.F.R. § 76.1300. Because Comcast lacks a lawful business justification for its differential treatment between MASN and its affiliated RSNs, Comcast's conduct violates the Cable Act and this Commission's rules. *See* 47 U.S.C. § 536(a)(3); 47 C.F.R. §§ 76.1300-1302; *Adelphia Order* ¶ 43. In view of Comcast's unlawful discrimination, MASN is entitled to a declaration from this Commission that Comcast is violating its program carriage obligations by refusing to carry MASN on its Comcast systems located throughout MASN's Territory as described below; to an order remedying Comcast's unreasonable refusal to carry MASN in those

REDACTED

systems; to damages arising from Comcast's failure to comply with its federal-law obligations; and to such other relief as the Commission may deem just and appropriate.

Expeditious action by this Commission is imperative. This Commission has affirmed its commitment to the timely resolution of program access proceedings, and the same principles compel an expeditious resolution of Comcast's discriminatory conduct here. Comcast's discrimination against MASN has already prevented more than [REDACTED] subscribers from watching Nationals games in four MLB seasons: 2005, 2006, 2007, and now 2008. Those same [REDACTED] subscribers have been prevented by Comcast from watching the Orioles in 2007 and now 2008. Timely and decisive action by this Commission is crucial to prevent that blackout from continuing and to vindicate the public interests animating the Commission's program carriage rules.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of)
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TCR Sports Broadcasting Holding, L.L.P.,)
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Complainant,)
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v.)
)
Comcast Corporation,)
)
Defendant.)

File No. _____

CARRIAGE AGREEMENT COMPLAINT

1. Pursuant to section 616 of the Communications Act of 1934, as amended, 47 U.S.C. § 536, and the Commission's program carriage rules, 47 C.F.R. §§ 76.1300-1302, Complainant TCR Sports Broadcasting Holding, L.L.P., doing business as Mid-Atlantic Sports Network, Inc., brings this Complaint against defendant Comcast Corporation based on Comcast's unreasonable and discriminatory refusal to carry MASN in and around Harrisburg, Pennsylvania, in the Tri-Cities region of southwestern Virginia, in Roanoke and Lynchburg, Virginia, and in various cable systems in smaller communities where Comcast has cable systems within MASN's territory.⁵

JURISDICTION

2. The Commission has jurisdiction to consider this Complaint under 47 U.S.C. § 536, and the Commission's program carriage rules, 47 C.F.R. §§ 76.1300-1302.

⁵ These various systems are in the Richmond-Petersburg, Charlottesville, Norfolk, Pittsburgh, and other DMAs. See Wyche Decl., Exh. A.

THE PARTIES

3. TCR Sports Broadcasting Holding, L.L.P. ("TCR") is a Maryland limited liability partnership with its principal place of business located at 333 West Camden Street, Baltimore, Maryland 21201. TCR's phone number is (410) 625-7100. The general partner of TCR is Baltimore Orioles Limited Partnership. TCR is a regional sports network ("RSN") that owns the underlying rights to produce and exhibit Baltimore Orioles baseball games. In 2001, TCR began operating a regional sports network under the trade name, "Orioles Baseball Network" for the over-the-air broadcasts of Orioles games. Pursuant to an agreement between and among Major League Baseball ("MLB"), TCR, and the Baltimore Orioles that was entered into on March 28, 2005, TCR now also owns the right to produce and exhibit Washington Nationals games (*see* Exh. 7, attached). Pursuant to a registration with the State of Maryland, TCR does business as Mid-Atlantic Sports Network ("MASN"). MASN is a "video programming vendor" under 47 C.F.R. § 76.1300(e).

4. Comcast Corporation ("Comcast") is a Pennsylvania corporation with its principal place of business at One Comcast Center, Philadelphia, Pennsylvania 19103. Comcast's phone number is (215) 286-1700. Comcast is a "cable operator" and a "multichannel video programming distributor" ("MVPD") within the meaning of 47 C.F.R. § 76.1300(d). Comcast is a vertically integrated MVPD, as it owns at least twelve RSNs that operate in various areas across the country, as well as other video programming networks. Comcast is the nation's largest cable operator and MVPD. Its cable systems pass 47 million homes (including in Pennsylvania and Virginia) – approximately 42% of all U.S. homes.⁶ Comcast serves

⁶ See Comcast Press Release, *Comcast Reports 2006 Results and Outlook for 2007*, Financials Table 6 (Feb. 1, 2007) ("*Comcast 2006 Results*") (attached as Exh. 8); D. Shapiro, *et al.*, Banc of America Secs. LLC, *Battle for the Bundle: 3Q06 Wrap Up* at 24, Fig. 18 (Nov. 15,

approximately 35% of all cable subscribers nationwide, and approximately 24% of all nationwide MVPD subscribers.⁷

5. Comcast SportsNet Philadelphia, L.P. ("CSN-Philly") is a Pennsylvania corporation with its principal place of business at 3601 South Broad Street, Philadelphia, Pennsylvania 19148. CSN-Philly's phone number is (215) 952-5990. CSN-Philly is a "video programming vendor" under 47 C.F.R. § 76.1300(e). Comcast holds an "attributable interest" in CSN-Philly. See 47 C.F.R. § 76.1300(b); *Adelphia Order* ¶ 8 n.32 (Comcast owns an "84.1% interest" in CSN-Philly).

6. Comcast SportsNet Mid-Atlantic, L.P. ("CSN-MA") is a Delaware corporation with its principal place of business at 7700 Wisconsin Avenue, Suite 200, Bethesda, Maryland 20814. CSN-MA's phone number is (301) 718-3200. CSN-MA is a "video programming vendor" under 47 C.F.R. § 76.1300(e). Comcast holds an "attributable interest" in CSN-MA. See 47 C.F.R. § 76.1300(b); *Adelphia Order* ¶ 8 n.32 (Comcast owns a "100% interest" in CSN-MA).

STATEMENT OF FACTS

Major League Baseball in Pennsylvania and Virginia

7. The Baltimore Orioles and the Washington Nationals are hometown baseball teams in the six-state and District of Columbia area long ago designated by MLB and demarcated on the accompanying map (attached as Exh. 10).

2006) ("*Battle for the Bundle*") (attached as Exh. 9) (estimating 112 million households at year-end 2006).

⁷ See *Battle for the Bundle* at 24, Fig. 18 (estimating approximately 69 million cable subscriber homes and 99 million total multichannel video subscriber homes nationwide at year-end 2006); *Comcast 2006 Results* at 2 (reporting 24.2 million cable subscribers at year-end 2006).

8. Pursuant to the by-laws of MLB, each MLB team (e.g., the Orioles and the Nationals) is assigned television rights to certain geographic regions, which often include multiple states. *See* Wyche Decl. ¶¶ 2-3. MLB acted to advance the best interests of the game and baseball fans everywhere by allocating television rights based on its determination of which teams baseball fans in certain areas would, or would not, support. *See* Declaration of James Cuddihy ¶¶ 3-5 (“Cuddihy Decl.”) (attached as Exh. 11). Because MLB teams reside in only 17 of the nation’s 50 states, it is common for baseball franchises to have television territories encompassing more than just the state where the team is located. A baseball team is considered a hometown team throughout the area to which it is assigned television rights. The MLB territories encompass Designated Market Areas (“DMAs”), which are areas made up of contiguous counties jointly covered by a group of television stations, or subsections of DMAs.⁸ Certain MLB territories are assigned exclusively to one MLB team, while others are shared among teams. *See* Wyche Decl. ¶ 2. The home television territory for MASN consists of the entire states of Virginia, Maryland, and Delaware, the District of Columbia, and certain parts of southern Pennsylvania, eastern West Virginia, and a substantial part of North Carolina (“MASN’s Territory”). *See id.* ¶ 3.

9. On or before 1981, MLB determined that television rights in the Harrisburg-Lancaster-Lebanon-York DMA of Pennsylvania (“Harrisburg DMA”) should be shared among the Baltimore Orioles, Philadelphia Phillies, and Pittsburgh Pirates. *See id.* ¶ 4. MLB’s decision undoubtedly took into account that a mere 80 miles separates Harrisburg and Baltimore, whereas

⁸ 17 U.S.C. § 122(j)(2)(C) (citing the area as defined by Nielsen Media Research); *see also* Memorandum Opinion and Order, *Armstrong Utilities, Inc. Petition for Modification of the Philadelphia, Pennsylvania DMA*, 21 FCC Rcd 13475, ¶ 2 (2006); 47 C.F.R. § 76.55(e). There are 210 DMAs in the United States. *See* Nielsen Media Research, *U.S. Television Household Estimates* at 2-4 (Sept. 2004) (attached as Exh. 12).

the distance between Harrisburg and Philadelphia is more than 100 miles, and the distance between Harrisburg and Pittsburgh is more than 200 miles.⁹ The Harrisburg DMA has, since at least 1981, thus been an important source of fan support for the Baltimore Orioles. *See* Cuddihy Decl. ¶ 6.

10. In addition, pursuant to the 2005 Settlement Agreement that grew out of the move of the Montreal Expos to Washington, D.C., the Orioles agreed to share the franchise's entire television territory with the newly formed Washington Nationals. *See* Exh. 7. As a result, the Orioles, Phillies, Pirates, and Nationals now share television rights, and thus home team status, in the Harrisburg DMA.

11. In or around 1981, the Orioles were designated the exclusive MLB team for the Roanoke-Lynchburg and Tri-Cities DMAs and throughout the Commonwealth of Virginia. Pursuant to the 2005 Settlement Agreement, the Orioles and Nationals now share *exclusive* television rights, and thus *exclusive* home team status throughout the Commonwealth of Virginia, including in the Roanoke-Lynchburg DMA ("Roanoke DMA") and the Tri-Cities DMA (collectively, "southwestern Virginia DMAs"). That judgment, as with MLB's decisions regarding Harrisburg, reflected MLB's decision as to actual and potential demand for programming of MLB teams. *See* Cuddihy Decl. ¶¶ 3-5. Indeed, Virginia, and in particular southwestern Virginia, is an area where the Nationals and Orioles have obtained, and will continue to seek, the loyalties of baseball fans. *See id.* ¶ 6.

⁹ *See, e.g.*, <http://baltimore.oriolles.mlb.com/bal/ballpark/directions.jsp> (including driving directions to Camden Yards from "York, Harrisburg, [and] Central PA") (attached as Exh. 13).

Historical Viewership of MLB Games in Pennsylvania and Virginia

12. Professional baseball is one of the most popular sports in the United States. Indeed, MLB sells more tickets to live baseball games than tickets to the National Football League ("NFL"), National Basketball Association ("NBA"), and National Hockey League ("NHL") combined. It thus is not surprising that a hometown baseball team typically generates considerable fan interest, including fans' desire to follow the ups and downs of their favorite teams on an RSN throughout the course of a season. *See Wyche Decl.* ¶ 6. Fan interest in the Orioles and Nationals in the Harrisburg and southwestern Virginia DMAs is no exception, and illustrates why Comcast's refusal to carry MASN is contrary to the public interest.

13. Clear evidence of demand for MASN in the Harrisburg and the southwestern Virginia DMAs (and indeed, throughout the DMAs in Virginia) is that baseball games of the Orioles have been televised in and around Harrisburg and the southwestern Virginia DMAs since the late 1980s. Indeed, for a substantial part of that time period, Comcast's affiliated RSN, CSN-MA, telecast the Orioles games in those areas. *See Cuddihy Decl.* ¶ 11. That carriage reflected Comcast's business judgment that baseball fans in those areas were interested in watching Orioles games on cable television. As a Roanoke newspaper has explained, "Baltimore Orioles fans in Southwest Virginia are used to watching their team on TV. But this season, many of them will strike out when they pick up the remote. In past seasons, most O's games were televised by Comcast SportsNet." Mark Berman, *Not All Getting O's New Network*, Roanoke Times (Mar. 30, 2007) *available at* <http://www.roanoke.com/sports/baseball/wb/111008> (attached as Exh. 14).

14. Although the Nationals have only been a hometown team in the Harrisburg and the southwest Virginia DMAs (as well as across Virginia) since 2005, there is every reason to

expect that fan interest in the Nationals is at least as strong as for the Orioles. The Nationals are based in the nation's capital, Washington, D.C., which is roughly the same distance from Harrisburg as is Baltimore. That the Nationals play in the nation's capital gives the team a unique opportunity to attract the interest of sports fans everywhere, especially those in Virginia who have long followed Washington D.C.'s sports teams. Furthermore, 2008 is the inaugural season for Nationals Park – a more than \$600 million state-of-the-art ballpark – that raises the profile of the Nationals, draws fans from Pennsylvania and Virginia, and increases the following of the Nationals.¹⁰ In addition, the Nationals' 2005 acquisition of the Harrisburg Senators, a AA farm team, will also encourage Harrisburg baseball fans to become fans of the Nationals and deepens that community's tie to the Nationals as a hometown club in the area.¹¹

15. Considerable fan interest in the Nationals and Orioles in the Harrisburg area is further evidenced by the fact that every other major MVPD serving Harrisburg *except* for Comcast has agreed to carry MASN under the same terms that have been offered to Comcast. *See Cuddihy Decl.* ¶ 9. Comcast thus stands alone among major MVPDs in its refusal to carry MASN in the Harrisburg DMA. MASN has reached carriage agreements with other major MVPDs in southwestern Virginia, as well. *See id.* ¶ 10. Indeed, Comcast has launched some of its systems in communities farther from Washington and Baltimore than where the unlaunched Comcast and former Adelphia systems are located. *See Table attached as Exh. 17.* Those carriage decisions reflect the fact that MASN's programming is of interest to sports fans in Virginia.

¹⁰ *See* <http://washington.nationals.mlb.com/was/ballpark/index.jsp> (attached as Exh. 15).

¹¹ *See* http://www.senatorsbaseball.com/team_history.html (attached as Exh. 16).

16. The other geographic areas at issue in this proceeding also fall within the MLB-assigned television territory for which the Orioles and Nationals have exclusive television rights and thus constitute a natural fan base for those teams. *See* Cuddihy Decl. ¶¶ 6-7.

The Launch of MASN as an Independent, Unaffiliated RSN

17. In 1996, the Baltimore Orioles formed TCR as the holding company for the franchise's television production and exhibition rights. Between 1996 and 2006, TCR licensed the production and exhibition rights to certain Orioles games to another RSN, Home Team Sports ("HTS"), rather than produce and exhibit those games itself. After TCR's execution of the 1996 program licensing agreement with HTS, Comcast in 2001 acquired HTS. Comcast later changed the name of the RSN from HTS to CSN-MA. TCR's program licensing agreement expired at the conclusion of the 2006 MLB season. TCR elected not to renew that agreement, and instead opted to produce and exhibit all Orioles games itself under its trade name "MASN" rather than license certain games to a third party network (i.e., Comcast's RSNs).

18. MASN launched its telecasts of Nationals games on Opening Day of the 2005 MLB season, the Nationals' inaugural season. In MASN's first two years of operations it telecast Nationals games. Beginning with the 2007 MLB season, MASN commenced its telecast of Orioles games. In fact, during the 2007 MLB season, MASN broadcast 321 live regular season MLB games – more MLB action than any other RSN in the country, and among the top with respect to live major professional sports programming of all RSNs in the country. Because the Orioles and Nationals play in different leagues and because MASN telecasts every inning of virtually every Orioles and Nationals game, MASN is distinctive compared to most other RSNs in that major league baseball fans can watch all 30 MLB teams.

19. In addition to its core baseball programming, MASN is continually adding to its sports lineup in an effort to market a product that is attractive across MASN's Territory. *See* Cuddihy Decl. ¶¶ 13-14. Thus, in addition to its Orioles and Nationals programming, MASN boasts the largest college basketball package available in the mid-Atlantic region, consisting of more than 170 NCAA Division I men's basketball games, an average of one game per day during the college basketball season (MASN, for example, is the official RSN of Georgetown basketball). *See id.* ¶ 13. In addition, MASN is committed to providing a popular lineup of NCAA football games, and carries approximately 40 NCAA Division football games every fall, with frequent Saturday double- and triple-headers. *See id.* Beyond that, MASN has a robust lineup of college lacrosse games featuring local teams such as Johns Hopkins, Georgetown, and Navy, and teams of interest in communities where Comcast has not launched MASN, such as the University of Pittsburgh (10 basketball and 5 football games) and Villanova (4 basketball games). MASN is the Official Mid-Atlantic Cable Network of the Big South – telecasting college football and basketball games of schools located in the Roanoke DMA, such as the Virginia Military Institute, Radford University, and Liberty University. In 2007-2008, MASN telecast a total of 20 college football and basketball games from those institutions that Comcast subscribers in the Roanoke DMA region were precluded from seeing as a result of Comcast's refusal to carry MASN. *See id.* MASN is also the Official Cable Sports Network of the Baltimore Ravens, carrying all four pre-season games and season-long programming, interviews, and highlights not available on other channels. *See id.* ¶ 14. (Harrisburg has been designated by the NFL as within the Baltimore Ravens home market television territory for purposes of delineating television restrictions. *See id.*)

**Comcast's History of Discrimination Against MASN and
MASN's Carriage Agreement Complaint**

20. Since well before its launch as a 24/7 network in July 2006, MASN has been seeking carriage on the networks of MVPDs throughout MASN's Territory. Given the demand for MASN's lineup of sports programming across that territory, MASN has been successful in reaching carriage agreements with numerous MVPDs, including Antietam, Armstrong, Atlantic, Bay Country, Charter, Clearview, Cox, DirecTV, Dish, Easton, FirstCom, Kuhn Communications, Mediacom, Metrocast, Millennium, Ntelos, OpenBand, Old Town Community Systems, RCN, and Verizon. It is telling that MASN, an independent, unaffiliated, team-owned RSN, has run into trouble primarily when dealing with vertically integrated cable giants Comcast and Time Warner Cable ("TWC").¹²

21. Since 2005, MASN has sought carriage on all of Comcast's cable systems located within MASN's Territory (which tracks MLB's designated television territories for the Orioles and Nationals), including the Harrisburg and southwest Virginia DMAs. Indeed, a team of MASN representatives first met with Comcast executives in April 2005 to discuss the possibility of carriage. MASN made a carriage request for Comcast to carry MASN on its cable system throughout MASN's Territory. At that time, no party raised the possibility that any of Comcast's cable systems within MASN's Territory would be excluded from any carriage agreement. *See* Gluck Decl. ¶ 4.

¹² TWC's refusal to distribute MASN has led to an arbitration proceeding under this Commission's *Adelphia Order*. Two arbitrators have now concluded that TWC has discriminated against MASN in violation of Congress's and the FCC's non-discrimination mandate.

22. As is recounted in the earlier carriage complaint filed with this Commission,¹³ Comcast began a systematic campaign to undermine MASN in 2005. Part of Comcast's animosity derived from the fact that Comcast originally sought to obtain from MLB the right to produce and exhibit the Nationals games through its own RSN and to retain the telecast rights to Orioles games.

23. After the 2005 Settlement Agreement, Comcast refused for 16 more months to negotiate for carriage with MASN. Indeed, less than one week after MASN officials went to Philadelphia to meet with Comcast to discuss possible carriage terms on Comcast's systems in April 2005, CSN-MA filed a lawsuit in the Circuit Court for Montgomery County based on MASN's decision to produce Orioles games itself. During the time that CSN-MA's (meritless) lawsuit was pending,¹⁴ Comcast refused to negotiate carriage with MASN.

24. Besides the lawsuit, and on numerous occasions, Comcast attempted to persuade MLB to terminate its agreement with MASN and instead to grant the telecast rights to Orioles and Nationals games to CSN-MA. See Tom Heath, *Orioles Accuse Comcast of Intimidating Cable Prospects*, Washington Post, May 24, 2005, at D1 (attached as Exh. 20). Comcast also communicated orally and in writing with virtually every MVPD in MASN's Territory and sent letters to every member of Congress in an attempt to undermine MASN's efforts to secure carriage agreements across MASN's Territory. See Carriage Complaint at 25-26.

¹³ See Carriage Agreement Complaint, *TCR Sports Broadcasting Holding, L.L.P. v. Comcast Corp.*, MB Docket No. 06-148, CSR-6911-N (FCC filed June 14, 2005) ("Carriage Complaint") (attached as Exh. 18).

¹⁴ MASN successfully defended its rights in the Circuit Court for Montgomery County, which twice dismissed Comcast's complaint for failure to state a claim. See The Associated Press, *Judge again dismisses Comcast suit on Nationals' broadcast rights*, Oct. 5, 2005 (attached as Exh. 19).

25. In light of Comcast's conduct, MASN sought relief from this Commission. In June 2005, MASN filed a program carriage complaint pursuant to the Cable Act and the Commission's rules. MASN alleged that "Comcast has unreasonably restrained the ability of [MASN] to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors" and that Comcast "has taken actions that have the effect of constituting a demand for a financial interest in a nonaffiliated video programming vendor as a condition of carriage on Comcast's cable systems."¹⁵ MASN requested, among other things, that the Commission "order Comcast to provide carriage on *all* Comcast systems."¹⁶

26. MASN also filed an Emergency Petition for Temporary Injunctive Relief requesting an order that Comcast immediately comply with this Commission's rules by ceasing its discriminatory activities against MASN and that Comcast immediately carry the games of the Nationals in the team's inaugural season.¹⁷

The Adelfia Order and the MASN Order

27. In 2005, Comcast and TWC applied for the Commission's approval to acquire the cable assets of Adelfia Communications Corporation ("Adelfia") and to swap certain assets between them. The effect of that transaction was to increase Comcast's consolidation (or clustering) in certain regions and thus to increase Comcast's incentive and ability to discriminate against independent RSNs such as MASN. In addition to filing its program carriage complaint, MASN submitted comments in the *Adelfia* proceeding asking the Commission to impose

¹⁵ Carriage Complaint at 1-2.

¹⁶ *Id.* at 33 (emphasis added).

¹⁷ Emergency Petition for Temporary Injunctive Relief, *TCR Sports Broadcasting Holding, L.L.P. v. Comcast Corp.*, MB Docket No. 06-148, CSR-6911-N, at 1-2 (FCC filed June 14, 2005) (attached as Exh. 21).

conditions on Comcast's request to transfer licenses from Adelphia to Comcast in connection with the proposed transaction.¹⁸

28. MASN's comments established that authorizing Comcast to acquire Adelphia's assets would increase Comcast's incentives as a vertically integrated MVPD to discriminate against unaffiliated RSNs and would increase its ability to drive competing, unaffiliated RSNs out of the market. MASN requested that, if the Commission did approve the transfers of Adelphia's assets to Comcast, it should protect unaffiliated RSNs from the increased incentive and ability of Comcast to discriminate against unaffiliated RSNs by providing for the expeditious arbitration of carriage disputes.

29. This Commission approved the *Adelphia* transaction, after making findings and imposing conditions relevant here. The Commission concluded that the acquisition of Adelphia's assets by Comcast would increase the cable giant's "incentive and ability" to discriminate against non-affiliated RSNs such as MASN. *Adelphia Order* ¶¶ 116, 189. Specifically, the Commission concluded that an effect of the transaction would be to "vertically integrate . . . [Comcast's] upstream programming assets with Adelphia's downstream cable systems." *Id.* ¶ 115. Beyond that, "[TWC's] and Comcast's exchange of cable systems will further concentrate each firm's market share in particular regions." *Id.* The Commission concluded that such concentration would, "[w]ith respect to concerns relating to program carriage . . . increase the incentive and ability of [Comcast] to deny carriage to RSNs that are not affiliated with [it]." *Id.* ¶ 116.

¹⁸ See Petition of TCR Sports Broadcasting Holding, L.L.P. to Impose Conditions or, In the Alternative, to Deny Parts of the Proposed Transaction, *Applications for Consent to the Assignment and/or Transfer of Control of Licenses; Adelphia Communications Corp. to Time Warner Cable Inc.; Adelphia Communications Corp. to Comcast Corp.; Comcast Corp. to Time Warner Inc.; Time Warner Inc. to Comcast Corp.*, MB Docket No. 05-192 (FCC filed July 21, 2005) (attached as Exh. 22).